TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1942

No. 493

DONALD WHEELDIN AND ADMIRAL DAWSON,
PETITIONERS

vs.

WILLIAM WHEELER

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR CERTIORARI FILED APRIL 30, 1942
CERTIORARI GRANTED OCTOBER 5, 1942

Supreme Court of the United States

OCTOBER TERM, 1962

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ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT

INDEX

[fol. 2]

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 833-58 WM

DONALD WHEELDIN and ADMIRAL DAWSON, PLAINTIFFS

vs.

WILLIAM WHEELER, ROBERT W. WARE, EUGENE W. BISCAILUZ, AMERICAN BONDING COMPANY OF BALTIMORE, A Corporation, LUMBERMENS MUTUAL CASUALTY COMPANY, A Corporation, DEFENDANTS

COMPLAINT FOR DECLARATORY JUDGMENT AND FOR DAMAGES

Plaintiffs allege:

FIRST CAUSE OF ACTION BEING ON BEHALF OF PLAINTIFF, DONALD WHEELDIN:

I

This Court has jurisdiction under Article III, Section 2 of the United States Constitution and under Title 28 U.S.C. Sections 1331, 2201 and 544(c). The matter in controversy exceeds the sum or value of Ten Thousand ($10,000.00) Dollars, exclusive of interest and costs.

II

Plaintiff, Donald Wheeldin, is a citizen of the United States and a permanent resident of this judicial district. [fol. 3] He is a newspaper reporter by profession.

III

Defendant William Wheeler, is a permanent resident of Fullerton, California and within this judicial district. He is, and for many years last past has been, a special investigator of the Committee on Un-American Activities

of the House of Representatives, in charge of investigations for said Committe in this judicial district.

In all respects herein complained of he, as did the defendant Robert Ware, acted in excess of their authority, committed an abuse of process and acted in violation of the constitutional rights of plaintiff as set forth more particularly hereinbelow.

The defendant Wheeler, additionally, acted arbitrarily, and with a wanton and utter disregard of the rights of the plaintiff to be described below.

IV

Defendant Robert Ware is a permanent resident within this judicial district. He is the United States Marshal for the Southern District of California.

Defendant, American Bonding Company of Baltimore is a Maryland Corporation. Said defendant is the bonding company which is surety on the bond given by defendant Ware pursuant to 28 USC 544(a) and (b). Said bond, in the amount of $40,000.00, obligates the defend-
[fol. 4] ants Ware and American Bonding Company for the faithful performance of duty by defendant Ware and his deputies during his continuance in office. Said bond, pursuant to said 28 USC 544(a) and (b) was approved, filed and recorded in the office of the Clerk of this Court and at all times herein mentioned was and is in full force and effect.

V

On or about August 7, 1958, defendant Robert W. Ware, or his deputy acting under the control of said defendant Ware, served upon the plaintiff a subpoena to appear before the House of Representatives Committee on Un-American Activities in Los Angeles, California on August 18, 1958. Said subpoena is referred to herewith, incorporated herein as though fully set forth and a copy thereof attached hereto as Exhibit "A". Said service by said defendant Ware or his deputy, was upon the request of and/or under the direction of the defendant Wheeler.

Thereafter, the defendant Wheeler, in the manner to be described hereinbelow, advised the plaintiff by telegram that said subpoena was continued to September 2, 1958.

VI

Said subpoena and the service thereof are void and of no legal force or effect for the following reasons and because of the following circumstances:

[fol. 5] (1) *The Reasons.*

The Statute and House resolution [Public Law 601 § 121, 79th Cong., 2d Session (60 Stat 828); House Resolution 5 of the 85th Cong.] purporting to authorize the Committee on Un-American Activities to function, and to compel witnesses to appear and testify under compulsory process is unconstitutional and void, on its face, and as applied, because (a) violating free speech, assembly, association and opinion as guaranteed by the First Amendment, (b) abridging due process of law, assured by the Fifth Amendment, because vague and indefinite, and (c) being an unreasonable search and seizure in violation of the Fourth Amendment. Said House Committee, therefore, was and is not a competent tribunal to issue compulsory process and has no jurisdiction to issue the subpoena heretofore mentioned.

(2) *The Circumstances.*

(a) The plaintiff is not now a member of the Communist Party; he left the Communist Party because of fundamental differences with it; if required to appear before said Committee, he will not be a "co-operative" witness, as the Committee uses that term, in that he will not as a matter of plain conscience and simple morality, give the Committee any name of any person associated with him, either in the Communist Party or in any other political organization or activity; he will name no such persons for two reasons:

1. neither he, nor they to his knowledge, have violated any law or committed any wrong;

[fol. 6] 2. their being named publicly before said Committee, will result in loss of employment and other reprisals.

The foregoing matters are all known to the defendant Wheeler, as are the matters to be set forth hereinbelow.

(b) The subpoena aforesaid was issued by the defendant Wheeler, in that, although it bears the signature of Francis E. Walter, as the plaintiff is informed and believes and therefore alleges, said Walter did not personally direct the plaintiff to appear, as set forth in said subpoena, on its face; and, said Walter had no personal knowledge on or before the 12th day of July, 1958, the date of said subpoena, that the plaintiff was being subpoenaed. The manner of issuing said subpoena directed to the plaintiff, as the plaintiff is informed and believes, is that said Wheeler, as investigator for said Committee, secured from the staff of said Committee, blank subpoenas in large numbers, in all respects except the signature thereof completely blank; and thereafter, in his discretion and upon consultation with other employees of the Committee, on its staff, said defendant Wheeler determined what name would be inserted in said subpoena; and, that, with respect to the instant subpoena, said defendant filled out the name, address and other pertinent portions thereof, and arranged for service of said subpoena by delivering same to the defendant Ware.

Said subpoena was filled out by the defendant Wheeler in Fullerton, California and delivered by him to the [fol. 7] defendant Ware in Los Angeles, California, for appearance by the plaintiff in Los Angeles, California, all within this judicial district.

On August 12, 1958, the defendant Wheeler, by telegram to the plaintiff, from said defendant's residence at Fullerton, California, advised the plaintiff, in the name of Francis E. Walter, Chairman, Committee on Un-American Activities, that the appearance of the plaintiff was postponed until September 2, 1958.

Said subpoena, procured by said defendant Wheeler as aforesaid, is intended by said defendant to compel the plaintiff to testify against his will, and to secure publicly information from the plaintiff about his beliefs, expressions and associations, particularly with respect to the Communist Party; all of which information is already fully known to, and in the possession of, said defendant and said Committee.

Said information, which said defendant intends publicly to elicit and/or cause to be elicited from the plaintiff.

in the manner and under the circumstances, and with the consequences, to the plaintiff, to be more fully described below, is neither desired by the Congress, nor useful to it; but is desired by the defendant, for the purpose of serving the personal and/or political aggrandizement of the members of said Committee and to punish the plaintiff because of his former Communist political affiliation and activity.

Additionally, said subpoena is intended by said de- [fol. 8] fendant to force the plaintiff to make public revelations about, and ruthlessly to expose, his beliefs, expressions and associations, which, although entirely innocent and lawful, at all times in the United States, are, at this time, in Los Angeles County, the community in which the plaintiff lives as well as throughout the nation, unorthodox, unpopular and even hateful.

Upon his appearance before the Committee, the plaintiff will be questioned by a staff member of the Committee, and documentary and other information about him, all intended to be derogatory, will be submitted to said Committee publicly, although already in the files of the Committee and known to its staff employees, said questions and said information, as the plaintiff is informed and believes, having been prepared by said defendant Wheeler.

Furthermore, upon his presence before said Committee he will have no right, and/or effective right, to counsel, to represent him and to protect his rights; his attorney will be permitted, so far as making a public statement, to state only his name and address, for the record; and, his attorney may expect to be harrassed, in accordance with the practice of the Committee so to do, a practice, although condemned by the State Bar of California, particularly pursued by counsel for the Committee at its hearings in Los Angeles.

Said Committee will, in accordance with the practice so to do as to "unfriendly" witnesses, publicly accuse the plaintiff of disloyalty, and adjudge him "guilty" of [fol. 9] disloyalty, without fair hearing; and the defendant Wheeler, in accordance with his practice so to do, will arrange to get as much publicity both to said accusation and said "judgment", as possible, in the public press,

over radio and TV, and through all other means of mass communication, both in the Los Angeles area and throughout the Nation, in order to prevent the plaintiff's earning a livelihood, and in order to punish the plaintiff as severely as possible.

The procurement of the subpoena herein, by the defendant Wheeler, and its issuance, are intended by the said defendant, upon the appearance of the plaintiff before the Committee as an "unfriendly" witness to subject the plaintiff, in accordance with the common and regular practice of said Committee, to public shame, disgrace, ridicule, stigma, scorn and obloquy, and falsely to place upon the plaintiff the stain of the stamp of disloyalty, without any opportunity of fair defense, to his irreparable injury; and the plaintiff will be so subjected and damaged.

Moreover, said defendant Wheeler will cause the name and address of the plaintiff to be given to the public press, prior to his appearance before said Committee in order that the plaintiff may be publicly identified as a Communist or former Communist and in order further to harrass the plaintiff.

(c) Additionally, the appearance of the plaintiff, before said Committee, for the purposes aforesaid, namely publicly to be identified and exposed as, and accused and [fol. 10] "convicted" of being a Communist or former Communist for the purpose of visiting punishment and obloquy upon him as aforesaid, will result in his total unemployability in his profession as a newspaper reporter; as well, it will prejudice his status in, and subject him to dismissal from, membership in a number of voluntary organizations, all to his irreparable injury. Nor will the damage be to him alone; members of his family will also be subject to injury in that his wife, who is self-employed as a social worker, will lose some of her present clientele as well as opportunities to secure new clients; and his children, particularly his daughter attending university and his son in grade school, will be visited by ridicule and obloquy upon the public identification by the defendant, or by the Committee, of the plaintiff as a Communist or former Communist.

VII

By reason of the facts above set forth, plaintiff is entitled to a judgment by this Court declaring said subpoena to be illegal, null, void and of no force or effect. And plaintiff is entitled to relief pendente lite to that effect prior to the time he is now scheduled to appear before the said Committee; and/or that the return date of said subpoena be stayed and/or continued.

VIII

By reason of the acts of defendants Wheeler and Ware, [fol. 11] as above set forth, plaintiff has been damaged in the sum of $3,500.00 and is entitled to judgment in said amount against said defendant and against defendand American Bonding Company of Maryland, the surety of defendant Ware. Additionally, plaintiff is entitled to punitive damages against defendant Wheeler.

IX

The plaintiff is at present unemployed; he had no funds with which to hire counsel in Washington, D. C., for the purpose of filing a suit there nor to go to Washington to be a witness in his behalf or to pay for other witnesses to go to Washington, all witnesses in the matter being residents of Southern California, and within this judicial district. In connection with this law suit, his present counsel are serving without compensation from him, said attorneys being counsel for the American Civil Liberties Union of Southern California.

It is utterly impossible and impracticable for the plaintiff to prosecute this action in the United States District Court for the District of Columbia.

SECOND CAUSE OF ACTION BEING ON BEHALF OF PLAINTIFF, ADMIRAL DAWSON:

I

Plaintiff, Admiral Dawson, refers to and incorporates herein as though fully set forth the allegations of Para-

[fol. 12] graph I of the First Cause of Action on behalf of plaintiff Wheeldin.

II

Plaintiff is a citizen of the United States and a permanent resident of this judicial district. He is a plumber's helper by trade.

III

Plaintiff refers to and incorporates herein as though fully set forth the allegations contained in Paragraph III of the First Cause of Action on behalf of plaintiff Wheeldin save that Eugene W. Biscailuz is substituted where the name Robert W. Ware appears.

IV

Defendant Eugene W. Biscailuz is a permanent resident of this judicial district. He is the sheriff of Los Angeles County.

Defendant Lumbermens Mutual Casualty Company is a corporation doing business in California. Said defendant is the bonding company which is surety on the bond given by defendant Biscailuz pursuant to California Government Code Sections 24153, 1457 and 1458. Said bond is in an amount greater than the damages prayed for herein and obligates defendants Biscailuz and said Lumbermens Mutual Casualty Company for the faithful [fol. 13] performance of his, defendant Biscailuz', official duties. Said bond, pursuant to said California Government Code Sections 1457 and 1458 was approved, filed and recorded in the office of the Clerk of Los Angeles County and at all times herein mentioned was and is in full force and effect.

On or about July 31, 1958, defendant, Eugene W. Biscailuz, or his deputy acting under the control of said defendant Biscailuz, served upon plaintiff a subpoena to appear before the House of Representatives Committee on Un-American Activities in Los Angeles, California on

August 19, 1958. Said subpoena is referred to herewith, incorporated herein as though fully set forth and a copy thereof attached hereto as Exhibit "B". Said service by said defendant Biscailuz or his deputy was upon the request of and/or under the direction of defendant Wheeler.

Thereafter, defendant Wheeler, in the manner to be described below, advised plaintiff by telegram that said subpoena was continued to September 3, 1958.

VI

Plaintiff refers to and incorporates herein as though fully set forth the allegations contained in Paragraph VI, (1) of the First Cause of Action on behalf of plaintiff Wheeldin.

[fol. 14] 2. The circumstances which render said subpoena and the circumstances thereof void and of no legal force or effect are as follows:

(a) Because of conscience and on the basis of his rights under the First, Fourth and Fifth Amendments to the United States Constitution, plaintiff if required to appear before said Committee, will not be a "co-operative" witness, as the Committee designates those witnesses who serve its purposes; on the contrary, he will be an "unfriendly" witness, as the Committee uses that term.

The foregoing matter is known to the defendant Wheeler, as are the matters to be set forth hereinbelow.

(b) Plaintiff refers to and incorporates herein as though fully set forth, the allegations contained in Paragraph VI, 2, (b) of the First Cause of Action on behalf of plaintiff Wheeldin save that the name of defendant Biscailuz is substituted the name of defendant Ware and the date of plaintiff's postponed appearance date is September 3, 1958 rather than September 2, 1958.

(c) Additionally, the appearance of plaintiff, before said Committee, for the purposes aforesaid, namely, publicly to be identified and exposed as a Communist or former Communist for the purpose of visiting punishment and obloquy upon him as aforesaid, will result in extreme difficulty for him to obtain employment as well

as prejudice his status in, and subject him to dismissal [fol. 15] from membership in, a number of voluntary organizations, all to his irreparable injury. Nor will the damage be to him alone; members of his family will also be subject to injury in that plaintiff's wife is pregnant and the discharge of plaintiff from his employment as hereinafter set forth has caused her great mental anguish; additionally plaintiff's public appearance before the Committee and his public identification as a Communist or former Communist will cause her further anguish and will cause her and his two minor children to be visited by ridicule, shame and obloquy.

(d) Said subpoena was served upon plaintiff on the job while he was working. As a result thereof, and because of the service of said subpoena, plaintiff was discharged from his employment. At the time of his discharge, plaintiff was earning the sum of $82.66 per week. Said service of plaintiff on the job was under the direction of defendant Wheeler who knew said service would result in his loss of employment and he was so served in order to cause said loss.

VII

Plaintiff refers to and incorporates herein the allegations of Paragraphs VII, VIII and IX of the First Cause of Action on behalf of plaintiff Wheeldin.

WHEREFORE, plaintiffs pray for judgment as follows:

1. That this Court declare the subpoenas served upon plaintiffs, Exhibits "A" and "B" attached here-
[fol. 16] to, to be illegal, null, void and of no force or effect,

2. That this Court issue an order, pendente lite, or until further order of this Court, staying, and/or continuing the return date of said subpoenas.

3. For damages to plaintiff Wheeldin against defendants Wheeler, Ware and American Bonding Company of Maryland in the sum of $10,500.00;

4. For damages to plaintiff Dawson against defendants Wheeler, Biscailuz and Lumbermens Mutual Casualty Company in the sum of $10,500.00;

5. For punitive damages to each of the plaintiffs against defendant Wheeler in the sum of $10.00;

6. For costs of suit incurred herein;

7. For such other and further relief as to the Court shall seem just and proper.

A. L. WIRIN
FRED OKRAND
Attorneys for Plaintiffs.

[fol. 17] EXHIBIT "A" TO COMPLAINT

UNITED STATES OF AMERICA
CONGRESS OF THE UNITED STATES

To DONALD WHEELDIN—145 Hurlbut Street, Pasadena, California, Greeting:

PURSUANT to lawful authority, YOU ARE HEREBY COMMANDED To be and appear before the Committee on Un-American Activities of the House of Representatives of the United States, or a duly appointed subcommittee thereof, on August 18, 1958, at 9:00 o'clock, a.m. at their Committee Room, Room 229 Federal Bldg., Spring and Temple Sts. Los Angeles, Calif. then and there to testify touching matters of inquiry committed to said committee, and not to depart without leave of said committee.

YOU ARE HEREBY COMMANDED to bring with you and produce before said committee, or a duly authorized subcommittee thereof, the following:

HEREOF FAIL NOT, as you will answer your default under the pains and penalties in such cases made and provided.

To Robert Ware, U.S. Marshal, to serve and return.

GIVEN under my hand this 18th day of July, in the year of our Lord, 1958.

/s/ Francis E. Walter
Chairman—Chairman of Subcommittee—
Member Designate of the Committee on
Un-American Activities of the House of
Representatives.

[fol. 18] EXHIBIT "B" TO COMPLAINT

UNITED STATES OF AMERICA
CONGRESS OF THE UNITED STATES

To ADMIRAL GEORGE DAWSON—3417 11th Avenue, Los Angeles, Calif., Greeting:

PURSUANT to lawful authority, YOU ARE HEREBY COMMANDED to be and appear before the Committee on Un-American Activities of the House of Representatives of the United States, or a duly appointed subcommittee thereof, on August 19, 1958, at 9:00 o'clock, a.m. at their Committee Room, Room 229, Federal Bldg., Spring and Temple Sts. Los Angeles, Calif. then and there to testify touching matters of inquiry committed to said committee, and not to depart without leave of said committee.

YOU ARE HEREBY COMMANDED to bring with you and produce before said committee, or a duly authorized subcommittee thereof, the following:

HEREOF FAIL NOT, as you will answer your default under the pains and penalties in such cases made and provided.

To Sheriff Eugene Biscailuz, to serve and return.

Given under my hand this 18th day of July, in the year of our Lord, 1958.

/s/ Francis E. Walter
Chairman—Chairman of Subcommittee—
Member Designate of the Committee on
Un-American Activities of the House of
Representatives.

[fol. 19]

IN UNITED STATES DISTRICT COURT

AMENDMENT TO COMPLAINT

No responsive pleading having been filed, and through inadvertence the figure "$3,500.00 appearing in Paragraph VIII, pg. 8, line 1, of the First Cause of Action, plaintiffs amend the complaint by substituting "$10,-500.00" in place of "$3,500.00" in Paragraph VIII, pg. 8, line 1 of said First Cause of Action.

Plaintiffs further amend their complaint by adding a new paragraph, to be numbered X, to the First Cause of Action as follows:

X

As a newspaper reporter, plaintiff has had occasion to observe the conduct of the House Committee on Un-American Activities and to report on its hearings in Los Angeles. He has also read about the conduct of the Committee and its representatives. The allegations contained in Paragraphs VI, (2) (b) and (c) herein as to the conduct of the defendant Wheeler and said Committee, the purpose of plaintiff's being subpoenaed before the Committee and the harm that will befall plaintiff from being subpoenaed and forced to testify are based in large part upon the decision of the Supreme Court of the United States, In *Watkins* v. *United States*, 354 U.S. 178, the dissenting opinions in *United States* v. *Josephson*, 165 F. 2d 82, 93-100 (CA DC 1947, cert. den. 333 U.S. [fol. 20] 838) and Barsky v. United States, 167 F. 2d 241, 252-263 (CA DC 1948, cert. den. 334 U.S. 843) and upon material appearing in portions of the briefs for petitioners in *Enspak* v. *United States*, No. 67 U.S. Supreme Court, Oct. Term, 1953 and *Watkins* v. *United States*, No. 261 U.S. Supreme Court, Oct. Term, 1956. Said briefs are referred to and incorporated herein as though fully set forth and copies thereof attached to the original copy only of this Amendment, an plaintiff has no other copies which he can attach to the copies hereof.

Plaintiff relies upon Point II of the *Enspak* brief (pp. 55-131) and Points II, A and IV, B and C of the *Watkins* brief (pp. 41-58, 104-115). Plaintiff is informed and believes and therefore alleges that the statements appearing in said portions are true.

A. L. WIRIN
FRED OKRAND
Attorneys for Plaintiffs.

[fol. 21]

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

OPINION—August 28, 1958

THE COURT: In so far as the declaratory judgment sought here, I am of the opinion that the Court has jurisdiction.

There might be some claim of privilege on behalf of defendant Wheeler, but that hasn't been raised here.

QUERY: Whether the privilege of a Member of Congress extends to an agent of the Committee? What is sought essentially is a judicial declaration of rights and duties and, for the purposes of the declaration, the defendant Wheeler in my view is a party sufficient to support the action without joining members of the Committee as defendants. The relief could operate upon him in the sense of the holding in Williams vs. Fanning (332 U.S. 490 (1947)) as well as it could upon members of the Committee and members of the Committee could defend through him as well as they could defend in person, in my view. It seems to me that it would be an outrageous thing to say to citizens that they couldn't have any declaratory relief in a situation like this without going to Washington for it. Of course I am influenced in that view by the deep feeling that there is too much of this going to Washington for adjudication anyhow; that the Government should be willing to meet its citizens in any of its courts, wherever the citizen might happen to be, as a general proposition. (See Jeffries v. Olesen, 121 F. Supp. 463, 475 (S.D. Cal. 1954)).

So, as to the indispensable party argument, I hold that the members of the Committee are not indispensable parties; that the Court does have jurisdiction of the claim for declaratory relief invoked under the Constitution and [fol. 22] laws of the United States, invoked under Section 1331, Title 28.

That brings us face to face with the question of whether or not there is a justiciable controversy here which is ripe for adjudication.

Presumably the Statute and the Resolution are valid. Presumably the Committee has Constitutional power here to issue these subpoenas, and that question should not be reached by this court, in any event, unless compelled to do so.

The argument is made that the Watkins case changes things with respect to the scope of the Committee's freedom of action in such matters as this. Of course if that is so, the plaintiffs can appeal to the Committee, and this Court must assume that the Committee will obey the Constitution and the laws of the United States the same as any court would. Particularly that is true in the field where discretion is to be exercised. It is alleged here that the Committee has acted in a certain way in the past and upon that basis it is urged that the Court assume in entertaining this action that it might act that way in the future. Again, the presumption must be that the Committee will act lawfully at all times.

Analogizing a Congressional Committee to an administrative body, which is straining matters considerably, one might apply the language of Mr. Justice Frankfurter in [fol. 23] Eccles vs. Peoples Bank, 333 U.S. 426, 434 (1948):

> "Where administrative intention is expressed but has not yet come to fruition, or where that intention is unknown, we have held that the controversy is not yet ripe for equitable intervention."

Whether to entertain the action for declaratory judgment here and grant the relief sought is a matter within the discretion of the Court. (Brillhart v. Excess Ins. Co., 316 U.S. 491 (1942)) And in this field where the Court is asked in effect to interfere with the activities of a Congressional Committee, it seems to me the Court as a matter of policy should refuse to interfere unless confronted with something more than a mere apprehension that some Federal Constitutional right may be infringed at some future time.

For that reason, an order will be entered dismissing the action in so far as a declaratory judgment is sought, but solely upon the ground that in the appropriate exer-

cise of the court's discretion relief by way of declaratory judgment should be denied without consideration of the merits. (Great Lakes etc. Co. v. Huffman, 319 U.S. 293 (1943).

That leaves us with the claims for money, including the claims on the two bonds. As far as the Sheriff is concerned, there is no diversity jurisdiction invoked here under Section 1332 of Title 28 and in my opinion there is no claim on the bond arising under the Constitution or laws or treaties of the United States. (28 U.S.C., [fol. 24] Section 1331.) The Court will, on its own motion, pursuant to Rule 12(h), dismiss the claim as against the Sheriff for want of jurisdiction over the subject matter.

I am convinced the same ruling will have to be made with respect to the claim on the Marshal's bond and the claim for money damages against defendant Wheeler. Here also jurisdiction is invoked under Section 1331 of Title 28. I am of the view that the cause of action on the Marshal's bond arises under the laws of the State and that there is no Federal cause of action as such on the Marshal's bond. The only time that a claim could arise I assume would be where the Marshal is said to have acted beyond his lawful power in serving a process such as the subpoenas here, and in such a case the Marshal would be acting under color of authority of his office. So I suppose the removal statute might provide an option to the Marshal to remove it from the State Court to this court, in which event this court would be obliged to entertain it (28 U.S.C., Section 1442(a)(1)), but as an original action brought in this court, I am convinced that the Court has no jurisdiction of its subject matter.

That disposes I believe of all the claims in the Complaint and would make it unnecessary to rule specifically upon the motion.

However, if I reached the motion, I should feel inclined to follow the District of Columbia Circuit in the [fol. 25] case of Mins vs. McCarthy (209 F. 2d 307 (D.C. Cir. 1953)), where the Court said that it was of the opinion that "where a Committee of the Congress has issued a subpoena ad testificandum to a witness to appear

at a hearing, without defining the questions to be asked, the judicial branch of the Government should not enjoin in advance the holding of the hearing or suspend the subpoena. The rights of witnesses in respect of any question actually asked at the hearing are subject to determination in appropriate proceedings thereafter." (See also In re Motion to Quash Subpoenas and Vacate Service, 146 F. Supp. 792 (W.D.Pa., 1956))

So, an order will be entered dismissing the action upon the grounds stated, and the motion to stay the subpoenas will be ordered off calendar.

The Government will prepare and settle under Local Rule 7 of the form of judgment of dismissal.

[fol. 44] • • • •

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION

Civil No. 833-58-WM

DONALD WHEELDIN and ADMIRAL DAWSON, PLAINTIFFS

vs.

WILLIAM WHEELER, ROBERT W. WARE, EUGENE W. BISCAILUZ, AMERICAN BONDING COMPANY OF BALTIMORE, a corporation, LUMBERMEN'S MUTUAL CASUALTY CO., a corporation, DEFENDANTS

JUDGMENT—August 28, 1958

The above cause, having come on for hearing on August 28, 1958, at 10 O'clock A.M., before the Honorable William C. Mathes, plaintiffs appearing by A. L. Wirin and Fred Okrand, Attorneys, Laughlin E. Waters, United States Attorney, Richard A. Lavine and Arline Martin, Assistant U.S. Attorneys, on the Motion for Stay and/or Continuance of Return Date of Subpoenas, and the defendants having filed a memorandum in opposition to [fol. 45] said motion and a suggestion that the Court dismiss the action under Rule 12(h) of the Federal Rules of Civil Procedure, and the matter having been argued both orally and in written memoranda, and the Court being fully advised.

NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

1. Insofar as declaratory relief is sought, the action is hereby dismissed "solely upon the ground that, in the appropriate exercise of the Court's discretion, relief by way of declaratory judgment should . . . [be] denied" without consideration of the merits. [*Great Lakes etc. Co.* v. *Huffman*, 319 U.S. 293, 301-302 (1943); *Brillhart* v. *Excess Ins. Co.*, 316 U.S. 491, 494-495 (1942).]

2. Insofar as a money judgment is sought, the action is hereby dismissed for lack of jurisdiction over the subject matter, there being no diversity of citizenship [28 U.S.C. § 1332] and there being no claim for money which "arises under the Constitution, laws or treaties of the United States" [28 U.S.C. § 1331].

August 28, 1958.

WM. C. MATHES
United States District Judge

[fol. 45-A]

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 16,219

DONALD WHEELDIN and ADMIRAL DAWSON, APPELLANTS

vs.

WILLIAM WHEELER, ROBERT W. WARE, EUGENE W. BISCAILUZ, FIDELITY AND DEPOSIT COMPANY OF MARYLAND, a corporation, and LUMBERMEN'S MUTUAL CASUALTY CO., a corporation, APPELLEES

On Appeal from the United States District Court for the Southern District of California, Central Division

OPINION—June 28, 1960

Before: CHAMBERS, BARNES and JERTBERG, Circuit Judges.

PER CURIAM:

Appellants (plaintiffs below) were subpoenaed to appear before a committee of the United States House of Representatives proposing to conduct a hearing in Los Angeles. Thereupon, as plaintiffs they filed a complaint against William Wheeler (a committee investigator) and against Robert W. Ware (the United States marshal) and Eugene Biscailuz (sheriff of Los Angeles County, California) together with the sureties of the last two named. The sheriff and marshal, through their deputies, served the subpoenas.

The complaint sought injunctive relief, a declaratory judgment as to validity of the subpoenas and money damages.

The claim for injunctive relief is now moot. The claim for declaratory judgment was rejected upon the exercise of the judicial discretion permitted the trial court under the statute, 28 U.S.C. § 2201. The claim for money damages was dismissed as to all defendants on the ground

[fol. 45-B] of lack of jurisdiction of the subject matter. Diversity of citizenship was not asserted.

The appeal from the judgment insofar as the request for injunctive relief is concerned is dismissed for the reason that the subject matter is now moot. As to the claim for declaratory relief, the judgment is affirmed for the reason that entertainment of the claim therefor was discretionary with the district court.

The appeal on the claim for money damages under the alleged facts as against the marshal and the sheriff (and their sureties) is such an unjustified harassment of these two officers that we hold the claim and the appeal thereon is so legally frivolous that the appeal as to them must be and is dismissed.[1]

As to House Investigator Wheeler, in the sense of Bell v. Hood, 327 U.S. 678,[2] we believe there was jurisdiction to entertain the claim for money damages.

At the proper time the district court can determine whether a claim was stated.

Affirmed, dismissed and reversed as indicated above.

* * * *

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[1] See John v. Gibson, 9 Cir. 1959, 270 F.2d 36; and Jiminez v. Barber, 9 Cir. 1958, 252 F.2d 550.

[2] Cf. Lowe v. Manhattan Beach School District, 9 Cir., 222 F.2d 258; Hicks v. City of Los Angeles, 9 Cir., 240 F.2d 495; Agnew v. City of Compton, 9 Cir., 239 F.2d 226.

[fol. 46]

IN UNITED STATES DISTRICT COURT

JUDGMENT DISMISSING ACTION OF THE PLAINTIFFS HEREIN—November 8, 1960

The above cause having come on for hearing on November 7, 1960 at 2:00 P.M., before the Honorable William C. Mathes, United States District Judge, plaintiffs appearing by A. L. Wirin and Fred Okrand, attorneys, and defendant William Wheeler appearing by Laughlin E. Waters, United States Attorney, Richard A. Lavine and Clarke A. Knicely, Assistant United States Attorneys, and Wright, Wright, Goldwater and Mack appearing by Andrew J. Davis, Jr., of counsel to the United States Attorney, on defendant William Wheeler's motion to dismiss for failure to state a claim upon which relief can be granted, and the matter having been submitted on written briefs and memoranda and all the papers and pleadings herein, and the Court being fully advised:

NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

That the action is hereby dismissed for failure to state a claim upon which relief can be granted pursuant to Rule 12(b) of the Federal Rules of Civil Procedure.

DATED: November 8, 1960.

/s/ Wm. C. Mathes
UNITED STATES DISTRICT JUDGE

(Filed 11/8/60; entered 11/9/60)

[fol. 47]

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Excerpt from Proceedings of Monday, October 23, 1961

Before: BARNES, JERTBERG and MERRILL, Circuit Judges

ORDER DIRECTING FILING OF OPINION AND FILING AND RECORDING OF JUDGMENT—October 23, 1961

ORDERED that the typewritten opinion this day rendered by this court in above cause be forthwith filed by the clerk, and that a judgment be filed and recorded in the minutes of this court in accordance with the opinion rendered.

The opinion and judgment of October 23, 1961 were withdrawn by order of January 30, 1962.

[fol. 48]

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

* * * *

ORDER DRECTING FILING OF OPINION, ETC. AND ORDER DENYING PETITION FOR REHEARING—January 30, 1962

ORDERED, that the typewritten opinion this day rendered by this court in above cause be forthwith filed by the clerk, and that a judgment be filed and recorded in the minutes of this court in accordance with the opinion rendered.

On consideration thereof and by direction of the court, IT IS ORDERED that the petition of appellant filed November 7, 1961 and within the time allowed therefor by rule of court for a rehearing of above cause be and hereby is, denied.

[fol. 49]

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 17,247

DONALD WHEELDIN and ADMIRAL DAWSON, APPELLANTS

vs.

WILLIAM WHEELER, APPELLEE

Upon Appeal from the United States District Court for the Southern District of California Central Division

OPINION—January 30, 1962

Before: BARNES, JERTBERG and MERRILL, Circuit Judges

MERRILL, Circuit Judge

Appellants were on August 7, 1958, subpoenaed to appear before the Unamerican Activities Committee of the United States House of Representatives, which was then proposing to conduct a hearing in Los Angeles. They resisted their duty to comply with the subpoenas, and Appellant Wheeldin's conviction of contempt for failure to respond was upheld by this court in Wheeldin vs. United States, 9 Cir., 1960, 283 F.2d 535, following Barenblatt vs. United States, 1959, 360 U.S. 109.

Appellants have now brought this action for money damages against appellee, a committee investigator who had been instrumental in issuing and serving the subpoenas, and have appealed to this court from judgment of the district court dismissing the action for failure of the complaint to state a claim.[1] The gravamen of their complaint is that the subpoenas were invalidly, maliciously and mischievously issued and served for the sole purpose

[1] The action originally sought additional relief and was brought against additional parties defendant, but these claims have already been eliminated. Wheeldin vs. Wheeler, 9 Cir., 1960, 280 F.2d 293.

[fol. 50] of exposing them to public scorn with consequent loss of employment and of esteem. They assert that they have a federal right to protection against such abuse of federal process; that since the subpoenas were not properly issued appellee in securing their issuance and service has subjected himself to personal liability.

The invalidity of the subpoenas, as claimed by appellants, is based upon the fact that they were by the chairman of the committee signed in blank. The names of the appellants as the witnesses subpoenaed were later filled in by the appellee. Appellants assert that no valid subpoenas were issued since the only issuance was of something in blank; that to sanction this practice of signing in blank is in effect to permit a delegation of authority to issue subpoenas; that no power to delegate this authority has been granted.

The practical dilemma faced by those authorized to issue subpoenas has been pointed out by Justice Jackson, concurring in Fleming vs. Mohawk Wrecking and Lumber Company, 1947, 331 U.S. 111, 123. As he explained, the workload is often such that the authorized individual "might sign large batches of blank subpoenas and turn them over to subordinates to be filled in over his signature. Or he might sign batches of subpoenas already made out by subordinates, probably without reading them and certainly without examining the causes for their issuance or the scope of the information required." [2]

The congressional committee in the case before us investigates through its investigators and one may assume that it would accept their conclusions as to the relevance of any witness' testimony. If, of the alternatives mentioned by Justice Jackson, the former practice is to be deemed an unauthorized delegation of authority while the latter is not, the distinction would appear to be some-

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[2] To the same effect is language by Justice Douglas, dissenting in Cudahy Packing Company, Ltd. vs. Holland, 1942, 315 U.S. 357, 368: "If the Administrator must issue subpoenas, it seems hardly likely that he can do anything but sign them in blank. If he tried to do anything but formulate the general policy to govern the exercise of the subpoena power, he could perform little more than ministerial acts."

what formal. To the extent that it has force, it should, in our view, have been raised in Wheeldin vs. United States, supra, where the appellants resisted their duty to comply. To hold that the personal liability of this [fol. 51] appellee must turn on such a distinction would, in our judgment, run counter to the principle of immunity recognized in Barr vs. Matteo, 1959, 360 U.S. 564. It would permit the rule of that case to be frustrated by a turn of formalities having little, if any, relation to the injurious conduct complained of.

Here the source of the claimed injury is that appellee, through the exercise of his official investigative power and based upon his appraisal of the evidence which would result from the appearance of these appellants, has seen fit to present them to the committee as proposed witnesses. They allege that appellee knew or should have known from his investigation that they had no information useful to the committee. They characterize his conduct as malicious and claim that his motive was to expose them to the abuse and scorn that he knew or should have known the committee would heap upon them. The injurious action of appellee thus followed from the conclusions drawn by him from his investigation, and resulted from the manner in which he has done the very thing he was employed to do. In no respect was the existence or extent of injury affected by the question of whether or not the subpoenas were valid (a question which would, however, affect the duty of appellants to respond).

In Barr vs. Matteo, at page 571, the reason for the grant of immunity is stated in the following language:

> "It has been thought important that officials of government should be free to exercise their duties unembarrassed by the fear of damage suits in respect of acts done in the course of those duties—suits which would consume time and energies which would otherwise be devoted to governmental service and the threat of which might appreciably inhibit the fearless, vigorous, and effective administration of policies of government."

The court quoted Judge Learned Hand in Gregoire vs. Biddle, 2 Cir., 1949, 177 F.2d 579, 581:

> "Again and again the public interest calls for action which may turn out to be founded on a mistake, in the face of which an official may later find himself hard put to it to satisfy a jury of his good faith. There must indeed be means of punishing public
> [fol. 52] officers who have been truant to their duties; but that is quite another matter from exposing such as have been honestly mistaken to suit by anyone who has suffered from their errors. As is so often the case, the answer must be found in a balance between the evils inevitable in either alternative. In this instance it has been thought in the end better to leave unredressed the wrongs done by dishonest officers than to subject those who try to do their duty to the constant dread of retaliation * * *."

As to what acts fall within the protected area, the court states at page 573:

> "It is not the title of his office but the duties with which the particular officer sought to be made to respond in damages is entrusted—the relation of the act complained of to 'matters committed by law to his control or supervision,' Spalding v. Vilas [161 U.S. 483] at 498—which must provide the guide in delineating the scope of the rule * * *."

We conclude that the conduct complained of falls within the scope of appellee's authority as a committee investigator and relates, in the words of Spalding vs. Vilas supra, to "matters committed by law to his control or supervision." As to injuries resulting from such conduct appellee is, under the rule of Barr vs. Matteo, immune from liability.

Affirmed.

* * * *

[fol. 53]

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 17247

DONALD WHEELDIN and ADMIRAL DAWSON, APPELLANTS

vs.

WILLIAM WHEELER, APPELLEE

JUDGEMENT—January 30, 1962

APPEAL from the United States District Court for the Southern District of California, Central Division.

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the Southern District of California, Central Division and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is affirmed.

Filed and entered January 30, 1962.

[fol. 54]

SUPREME COURT OF THE UNITED STATES

* * * * *

ORDER GRANTING MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS AND PETITION FOR WRIT OF CERTIORARI—October 8, 1962

ON PETITION FOR WRIT OF CERTIORARI TO the United States Court of Appeals for the Ninth Circuit.

ON CONSIDERATION of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted. The case is transferred to the appellate docket as No. 493 and placed on the summary calendar. In briefs and oral argument counsel are directed to discuss the question of federal jurisdiction.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

October 8, 1962

Mr. Justice Goldberg took no part in the consideration or decision of this motion and petition.

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